

Committee on Resources

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Testimony of

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Gail and Stan Watt d/b/a White Water West LLC
on S. 1003

before the

Subcommittee on Forests and Forest Health
House Committee on Resources

INTRODUCTION

This testimony is provided on behalf of Gail and Stan Watt d/b/a White Water West LLC. White Water West holds a Forest Service special-use permit authorizing the operation of an existing camp and related structures in the mainstem Salmon River corridor in Idaho. The Watts' ability to continue the operation of this camp or lodge, and to continue providing recreation visitor services in this national forest area, is immediately threatened by the Forest Service's implementation of the district court's decision in *Wilderness Watch v. U.S. Forest Service*, 143 F. Supp. 2d 1186 (D. Mont. 2000). That decision interprets provisions of the Wild and Scenic Rivers Act (WSRA 16 U.S.C. §§ 1271 et seq.) as essentially barring all permanent structures, including the three lodges, from the wild Salmon River corridor. 143 F. Supp. 2d at 1205 09. The court did not order the lodges' removal, but instructed the Forest Service to determine the best remedy. Id. at 1210-11.

Based on the Forest Service's decision, the Watts, along with the owners and operators of two other hunting and fishing camps permitted in the mainstem Salmon River corridor, must complete the removal of all nonessential items from the camp properties this fall of 2004, and then dismantle the lodges and begin hauling out all nonburnable materials in spring 2005. The lodges are set to be destroyed by the Forest Service through burning in fall 2005.

Prompt action by this Committee and the full House is appropriate to secure the passage of S. 1003 to amend Section 3(a)(24) of the Wild and Scenic Rivers Act to authorize the continuation of the established use and occupancy of these three outfitter hunting camps on the Salmon River. S. 1003 will remedy this situation and protect the continued operation and availability of the visitor services provided by the three lodges.

This testimony explains why S. 1003 is consistent with the WSRA and Central Idaho Wilderness Act and would conform management of the mainstem Salmon River to the vast majority of judicial decisions—other than the single *Wilderness Watch* decision—addressing WSRA administration standards under § 1281 of the Act.

BACKGROUND

A. Qualifications to Provide This Testimony.

I have represented the Watts and White Water West LLC as their attorney on these Forest Service lodge permitting issues since fall 2001. I also represented the other two lodge owners in their administrative appeal of the Forest Service's initial decision implementing the district court's decision on the WSRA. That appeal resulted in the Regional Forester remanding the decision to the Salmon-Challis National Forest for further consideration of the interests, including the economic interests, of the affected permittees. The Salmon-Challis National Forest's new decision on remand resulted in the lodge removal and burning deadlines outlined above.

The discussion of case law construing the WSRA and the legal arguments supporting the consistency of S. 1003 with the WSRA, this case law, and congressional intent in the Central Idaho Wilderness Act were

developed from research done in representing the Watts, the other lodge owners, and the Idaho Outfitters and Guides Association.

I have represented various clients ranging from conservation groups to resource developers before state and federal courts and before state and federal agencies on environmental and natural resource matters since 1989. I hold a master's degree in wildland recreation management from the University of Idaho's College of Natural Resources where my research focused on state river conservation issues and state programs implementing the federal WSRA's policies. I am personally familiar with wilderness and wild and scenic river conservation issues from visits to these areas (although I have not personally visited the lodges at issue), my academic experience, work as a Forest Service intern with the Student Conservation Association in Montana's Anaconda-Pintlar Wilderness, and my work as an attorney on these issues. A copy of my professional resume is at Attachment A to this testimony.

B. Background on The Lodge Issues.

In the 1980 Central Idaho Wilderness Act (CIWA), Congress designated a portion of the mainstem Salmon River through the Frank Church-River of No Return Wilderness as a national wild and scenic river. Pub. L. No. 96-312, 94 Stat. 948 (1980). At the time of designation, there were a number of existing permanent structures along the river corridor, including the Guth lodge formerly located at Big Squaw Creek, the Arctic Creek lodge, and the Stub Creek lodge. All three were rather rustic and used to facilitate public access to the area through authorized outfitting and guide services. In 1988, the Guth lodge was removed and replaced with a modern structure at a new site, Smith Gulch. The Guth lodge is now owned and operated by the Watts.

Wilderness Watch filed a lawsuit in 1991 challenging the issuance of permits for the new construction of the Guth lodge and for the continued existence of the other two lodges. The litigation was relatively dormant until July 2000 when the case was reassigned to Judge Thomas of the Ninth Circuit, sitting by designation, and decided by the district court in September 2000. *Wilderness Watch v. U.S. Forest Service*, 143 F. Supp. 2d 1186 (D. Mont. 2000). An article from the KTVB-Boise television station website describing the Watts' lodge and the current dilemma they face with the Forest Service's order to destroy their lodge is presented in Attachment B. This article is the text of a television news story that aired on KTVB in fall 2003.

DISCUSSION

A. The Wild and Scenic Rivers Act Does Not Preclude All Structures On A Designated Wild River.

A wild river segment is administered to "protect and enhance the values which caused it to be included in [the] system," while at the same time not "limiting other uses that do not substantially interfere with public use and enjoyment" of the wild river. WSRA § 1281(a). Permanent structures that facilitate "other uses" of the river and that do not "substantially interfere" with the "essentially primitive" nature of the river are permissible. See *id.* §§ 1281(a), 1273(b)(1). The terms of the statute itself indicate that Congress foresaw flexibility to the "essentially primitive" definition. See *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173, 1183-84 (D. Or. 2002) ("essentially primitive" language does not preclude Forest Service authorization of commercial motorized boat trips on Rouge wild and scenic river); see also *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1261 (E.D. Cal. 1999).

Congress also enacted policies subsequent to the WSRA that govern the Act's application to the Salmon River. See, e.g., *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1177-79 (9th Cir. 2000) (Hells Canyon Act amended WSRA and required that § 1281(a) determinations be made in accordance with both acts). In the Central Idaho Wilderness Act, Congress mandated that the less restrictive provisions of the WSRA govern when in conflict with the more protective Wilderness Act provisions for the mainstem Salmon. CIWA § 9(b). The CIWA specifically foresaw that established commercial uses would continue. CIWA § 2(a)(3); § 7(a)(3). Further, the CIWA specifically foresaw that some structures might exist in the wild river corridor. CIWA § 8(b) mandates that the Forest Service conduct an inventory of "ranch, homestead, trapper and other cabins, and structures . . . within the Salmon River component of the National Wild and Scenic Rivers System" and recommend whether such structures be restored, maintained, or removed. *Id.* § (b)(1)(D). Thus, to the degree that Congress has spoken on whether structures are allowed in the wild Salmon River corridor, Congress intended that some structures might be present. S. 1003 clarifies this congressional intent and therefore is in the public interest and consistent with the CIWA.

B. The Forest Service's WSRA Interpretation Allowing Some Limited Permanent Structures in the Wild Salmon River Corridor Was Permissible.

In its lodge permitting decisions, the Forest Service interpreted the WSRA, as modified by the CIWA, as allowing some permanent structures for hunting and outfitter uses. This interpretation is consistent with Congress' intent. The WSRA legislative history states that:

The bill has been referred to as an extension or corollary of the Wilderness Act, but its provisions are not nearly as restrictive. A national wild or scenic river area will be administered for its esthetic, scenic, historic, fish and wildlife, archeological, scientific, and recreational features, based on the special attributes of the area. However, it will not prohibit the construction of roads or bridges, timber harvesting and livestock grazing, and other uses that do not substantially interfere with public use and enjoyment of these values. S. Rep. No. 90 491, at 4 (1967). Similarly, the legislative history for the CIWA makes clear that wild river protections are compatible with "existing uses of the area" (S. Rep. No. 96 414, at 20 (1979)), allow for continued "outfitter and guide operations" (id. at 22), allow for "activities not generally permitted in wilderness areas" (id. at 23), and permit "continuation, as appropriate, of motorized travel on the river and outfitter and camping facilities within the river corridor" (id. at 28).

C. The Wilderness Watch Court's Interpretation of "Essentially Primitive" Is Inconsistent With the WSRA.

The District Court erred in concluding that the "essentially primitive" language in WSRA § 1273(b)(1) had the substantive effect of precluding permanent structures from the wild Salmon River corridor.

WSRA § 1273 and the term "essentially primitive" do not provide rigid substantive standards for uses of the wild river corridor. Instead, section 1273 sets forth a system by which rivers are to be added to the wild and scenic system and sets out standards for how rivers will be classified within the system. Wild rivers are "[t]hose rivers . . . that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted." § 1273(b)(1). Section 1273 was not designed to regulate the administration of rivers once in the wild and scenic system. Rather, § 1281(a)—the section entitled "Administration"—was meant to provide direction on how a wild river should be managed. The vast majority of court cases (other than the Wilderness Watch decision) do not interpret § 1273's "essentially primitive" language to limit a managing agency's ability to permit a particular use in a wild river corridor.

WSRA § 1281(a) provides:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.

Courts considering the WSRA's substantive limitations have uniformly, again except for the Wilderness Watch court, recognized that § 1281(a) provides the primary substantive direction for the Act. See *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 799 (9th Cir. 2003); *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1177-78 (9th Cir. 2000); *Sokol v. Kennedy*, 210 F.3d 876, 878 (8th Cir. 2000); *Center for Biological Diversity v. Lueckel*, 248 F. Supp. 2d 660, 662 (W.D. Mich. 2002); *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1252 (E.D. Cal. 1999); *National Wildlife Federation v. Cosgriffe*, 21 F. Supp. 2d 1211, 1215 (D. Or. 1998); *Oregon Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182, 1187 (D. Or. 1998); *Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133, 1143 44 (D. Or. 1997); *St. Croix Waterway Ass'n v. Meyer*, 942 F. Supp. 435, 438 (D. Minn. 1996); *Kiernat v. Chisago County*, 564 F. Supp. 1089, 1094 (D. Minn. 1983). Forest Service regulations regarding wild and scenic rivers have also incorporated the § 1281(a) "substantially interfere" standard. Peter M.K. Frost, *Protecting and Enhancing Wild and Scenic Rivers in the West*, 29 Idaho L. Rev. 313, 327 n.63 (1992). Practically no court other than the Wilderness Watch court has ever applied a substantive "essentially primitive" standard.

The Ninth Circuit held, just five days before Judge Thomas issued his decision, that Congress recognized in § 1281(a) that other uses of a wild river corridor might "interfere with public use and enjoyment" of the values motivating designation of the river, "but that not all such uses were to be prohibited. Only those uses that . . . 'substantially interfere' with the enjoyment and use of the values at issue . . . are to be limited." *Hells Canyon Alliance*, 227 F.3d at 1177-78. This interpretation gives managing agencies the necessary latitude in managing wild river uses, even if those uses may have some negative impact on the outstanding and remarkable values supporting designation, so long as the uses do not "substantially interfere" with those values. S. 1003 seeks Congress' affirmance of that original management structure in the WSRA.

Here, the Salmon River hunting lodges do not substantially interfere with the values for which the river was

designated. The Salmon River outstanding and remarkable values include: from the WSRA, scenic, recreational, geologic, fish and wildlife, historic, cultural, the essentially primitive nature of the corridor, esthetic, archeologic, and scientific values; and from the CIWA, the primitive and undeveloped character of the land (CIWA § 2(a)(1)), fish and wildlife values (CIWA § 2(a)(2)), and cultural resources (CIWA § 8 (a)(1)). The three lodges are consistent with the recreational and cultural values. The existence of such lodges would not damage geologic, historical, or scientific values. The Forest Service, in issuing the lodge permits, required mitigation to protect scenic, esthetic, and fish and wildlife values. The only outstanding and remarkable values that admittedly might be affected are the “primitive and undeveloped character” and the “essentially primitive” nature of the corridor values. But the relevant question under § 1281(a) is whether the existence of the lodges substantially interferes with these values. Here, as the Forest Service determined in permitting the lodges, they do not substantially interfere with these river values. S. 1003 would confirm congressional intent on this point, is consistent with the prevailing weight of judicial decisions construing the WSRA, and should be enacted to confirm the Forest Service’s ability to implement this congressional intent and original WSRA and CIWA management framework.

CONCLUSION

Congress foresaw a flexible management of wild and scenic river corridors. The three lodges here do not significantly interfere with the Salmon River’s outstanding and remarkable values. The Forest Service could, under the WSRA and CIWA and the prevailing legal framework (apart from the single Wilderness Watch case), permissibly issue permits for the lodges’ continued use.

S. 1003 would reaffirm Congress’ original view of wild and scenic river management for the mainstem Salmon River as expressed in the WSRA and CIWA. S. 1003 would also conform management of the mainstem Salmon River to the clear weight of judicial decisions addressing WSRA management standards under § 1281. S. 1003 should be enacted to achieve these important public purposes.